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No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, ET AL.,
Petitioners,

v.

STATE OF SOUTH DAKOTA,
Respondent.

On Writ Of Certiorari To The Supreme Court Of South Dakota

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The United States Catholic Conference respectfully moves this Court for leave to file a brief *amicus curiae* in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

This case involves the question of whether certain church schools fall within the scope of coverage of the South Dakota unemployment compensation statute. The Supreme Court of South Dakota has held that, under the Federal Unemployment Tax Act (FUTA), the State of South Dakota must cover church schools. It reversed the South Dakota Circuit Court and held that church schools were not exempt from coverage.

The United States Catholic Conference is the civil agency of the Catholic Bishops of the United States. The Catholic Church operates a large number of elementary and secondary schools which are a fundamental part of its mission. The decision of the South Dakota Supreme Court has a significant impact on these schools and thus directly affects the important interests of the Church.

This *amicus* urges upon this Court a different view of this case than that proposed by petitioners. It is our position that it is not necessary to consider the question of the constitutionality of FUTA since a proper construction of the statute and its legislative history compels a result in favor of petitioners.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
IDENTIFICATION AND INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Traditional Rules of Construction Make Clear That the 1976 FUTA Amendments Were Not Intended to Extinguish Forty Years of Exemption For Church Elementary and Secondary Schools. Suggestions of Possible Constitutional Problems (*N.L.R.B.* v. *Catholic Bishop*) Are Unnecessary to the Interpretative Process In This Case	3
When Amended In 1970, FUTA'S Exemption of Churches and Church Organizations Was Contained Entirely In Section 3309(b)(1)	4
The 1976 Amendments Did Not Revoke the FUTA Exemption of Elementary and Secondary Church Schools	9
If Doubt Persists Concerning the Foregoing Two Propositions, It Should be Resolved in Favor of Petitioners Without Constitutional Excursions	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:	PAGE
American Standard, Inc. v. *Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975) ..	5
Duparquet, Huot & Moneuse Co. et al. v. *Evans*, 297 U.S. 216 (1936)	5
Fogarty v. *United States*, 340 U.S. 8 (1950)	4
Globe v. *Rutgers Fire Ins. Co.* v. *Draper*, 66 F.2d 985 (9th Cir. 1933)	11
Gould v. *Gould*, 245 U.S. 151 (1917)	11
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	4, 9
Jones v. *Alfred H. Meyer Co.* 392 U.S. 409 (1968)	10
Kokoszka v. *Belford*, 417 U.S. 642 (1974)	5
Lemon v. *Kurtzman*, 403 U.S. 602 (1971).....	7
Meek v. *Pittenger*, 421 U.S. 349 (1975).....	7
Moragne v. *States Marine Lines*, 398 U.S. 375 (1970) ...	11
Morton v. *Mancari*, 417 U.S. 535 (1974)	10
NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979).....	3, 10
Philbrook v. *Glodgett*, 421 U.S. 707 (1975)	5
Posadas v. *National City Bank of New York*, 296 U.S. 497 (1936)	10
States of Ala. & Nev. v. *Marshall*, 626 F.2d 366 (5th Cir. 1980)	7
Tennessee Valley Authority v. *Hill*, _____ U.S. _____, _____, 98 S. Ct. 2279 (1978)	10
Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).....	11
United States v. *Price*, 361 U.S. 305 (1960)	9
United States v. *Re*, 336 F.2d 306, 315 (2 Cir. 1964) *cert. denied*, 379 U.S. 904 (1964).....	4
United States v. *Roth*, 333 F.2d 450, 454 (2d Cir. 1964) .	4

Table of Authorities Continued

CASES: PAGE

United States v. *United Mine Workers of America*, 330 U.S. 258 (1947) 9

Walz v. *Tax Commissioner of City of New York*, 397 U.S. 664 (1970) 3, 12

STATUTES:

26 U.S.C. §501(a) 4

26 U.S.C. §501(c)(3) 4, 8

26 U.S.C. §421(b)(1)(A) 6

26 U.S.C. §511(a)(2)(A) 6

26 U.S.C. §1402(e) 6

26 U.S.C. §3121(b)(8)(A) 6

26 U.S.C. §3306(c)(7) 2, 6, 8

26 U.S.C. §3306(c)(8) 4

26 U.S.C. §3309 4

26 U.S.C. §3309(a)(1)(A) 4, 8

26 U.S.C. §3309(a)(1)(B) 6, 8

26 U.S.C. §3309(b) 4, 5

26 U.S.C. §3309(b)(1) 2, 3, 4, 5, 7, 8, 9

26 U.S.C. §3309(b)(1)(A) 7

26 U.S.C. §3309(b)(2) 5

26 U.S.C. §3309(b)(3) 2, 3, 4, 7, 8, 9

26 U.S.C. §3309(d) 9

26 U.S.C. §3401(a)(9) 6

OTHER AUTHORITIES:

H.R. Rep. No. 612, 91st Cong., 1st Sess. (1969) 9

H.R. Rep. No 755 94th Cong., 1st Sess. (1975) 9

Table of Authorities Continued

OTHER AUTHORITIES:	PAGE
S. Rep. No. 1265, 94th Cong., 2nd Sess. (1976)	9
H.R. Conf. Rep. No. 1745, 94th Cong., 2nd Sess. (1976)	9
S. Rep. No. 1622, 83d Cong., 1st Sess. (1954)	6
Note, IRS Monitoring, 45 Fordham L. Rev. 929 (1977)	12
C. Sands, Sutherland Statutory Construction (4th ed. 1972)	11, 12
Whelan, "Church" in the Internal Revenue Code, 45 Fordham L. Rev. 885 (1977)	6, 20

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BRIEF OF UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

IDENTIFICATION AND INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is the civil agency of the Catholic Bishops of the United States. Its purpose is to unify and coordinate the activities of the Catholic people in the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities and other endeavors considered part of its religious mission.

Among its responsibilities, the USCC is authorized to represent the Catholic Bishops who speak for the Church in the United States on matters of public concern. When deemed appropriate and permitted by court rule or practice, the USCC offers its views in litigation touching important issues affecting interests of the Church and its people in the United States.

In this case the Supreme Court of South Dakota has held that the Federal Unemployment Tax Act ("FUTA") must be interpreted to require coverage of church schools under the South Dakota Unemployment Insurance Law. The Catholic Church operates a large number of elementary and secondary schools throughout the United States. In 1980 over 9,000 Catholic elementary and secondary schools served the educational needs of almost three and a half million Catholic and non-Catholic students. These schools are a fundamental part of the mission of the Church. The imposition of taxes and regulation under FUTA upon those schools would directly affect the Church in a most significant way.

SUMMARY OF ARGUMENT

The Supreme Court of South Dakota's decision that FUTA requires coverage of employees in elementary and secondary church schools misinterprets the statute and the legislative history. Since 1970, FUTA has treated exemptions for churches and church organizations entirely in section 3309(b)(1). Section 3309(b)(3) does not in terms apply to churches or church organizations, and applicable rules of construction in light of legislative history make clear it was not intended to deal with churches and their organizations, including their schools. Indeed, neither was it intended to apply to public schools which had been exempt from FUTA coverage until 1976 under section 3306(c)(7). Rather, section 3309(b)(3) was meant to deal with schools not already exempt under earlier provisions.

If any doubt of the correctness of this construction exists, it should be resolved by established rules of strict construction which do not require an exploration of potential constitutional involvements such as was deem-

ed necessary in *N.L.R.B.* v. *Catholic Bishop*, 440 U.S. 490 (1979). Regardless of their limited nature, both in scope as well as dicta, such explorations can have practical effect on the legislative process, the interpretation and implementation of statutes, and the regulatory climate. The delicacy and importance of church-state matters call for the application of the rules of construction which call for a strict or cautious interpretation of statutes which impose taxes, or purport to abrogate rights or privileges which have become deeply rooted in the fabric of our general law and public policy. Regarding the exemption of churches from taxation, this Court has held: "Few concepts are more deeply embedded in the fabric of our national life. . . ." *Walz* v. *Tax Commissioner of City of New York*, 397 U.S. 664, 678 (1970).

ARGUMENT

Traditional Rules Of Construction Make Clear That The 1976 FUTA Amendments Were Not Intended To Extinguish Forty Years Of Exemption For Elementary And Secondary Church Schools. Suggestions Of Possible Constitutional Problems (*N.L.R.B.* v. *Catholic Bishop*) Are Unnecessary To The Interpretative Process In This Case.

There are two questions of interpretation in this case:

1. When enacted, was subdivision (b)(1) of section 3309 of FUTA intended to apply to all church schools so that the repeal of subdivision (b)(3) in 1976 had no effect on their exemption?

2. If subdivision (b)(1) was so intended, are the Lutheran schools involved here exempt within the meaning of that subdivision?

Although this *amicus* supports the petitioners' claim of exemption, it will confine its presentation to the broader question first stated.

When amended in 1976 FUTA'S exemption of churches and church organizations was contained entirely in section 3309(b)(1).

The threshold question relates to the intent of Congress in 1970 when it enacted section 3309. If at that time it did not intend section 3309(b)(3) to apply in the area of church organizations, its repeal of that subdivision in 1976 could have no effect on such organizations.[1]

FUTA was enacted in 1935. Until 1970 it exempted all religious, charitable, educational and other organizations described in section 501(c)(3) of the Internal Revenue Code ("Code") which were exempt from income tax under section 501(a) of the Code. See FUTA Section 3306(c)(8). In 1970, section 3309(a)(1)(A) was added thereby extending mandatory state coverage to non-profit organizations except for certain exemptions continued or provided under section 3309(b).

When Congress enacted section 3309(b) it carefully delineated the classifications of exempt employers and services. The organization of that section calls a few

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[1] cf. *International Bro. of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977); *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950). The intent of a statute will be determined without reference to a much later amending statute. *United States* v. *Re*, 336 F.2d 306, 315 (2d Cir. 1964), *cert. denied*, 379 U.S. 904 (1964); *United States* v. *Roth*, 333 F.2d 450, 454 (2d Cir. 1964), *cert. denied*. 380, U.S. 942 (1965).

well-known canons of construction immediately into play. First, there is the imperative that all parts of a statute be read together and harmonized so that the legislative will may be discerned in a coherent expression of policy; no sentence or member of a sentence may be read in isolation.[2] A somewhat ancillary principle was expressed thus by Mr. Justice Cardozo:

> "To fix the meaning of these provisions there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts.[3]

In the cited case it was held that where a subject is covered earlier in the statute, a later provision will generally not be viewed as covering the same subject. Subdivisions of the same section which are interrelated "must, therefore, be read together for coherence".[4]

Section 3309(b) established six classifications of exempt employers or services. The first [subd.(1)] dealt with churches and church organizations. The second [subd.(2)] dealt with certain of their ministers and religious orders.[5] The remainder of section 3309(b) deals with other categories, the descriptions of which do not

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[2] *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974).

[3] *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U.S. 216, 218 (1936).

[4] *American Standard, Inc.* v. *Crane Co.*, 510 F.2d 1043, 1058 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

[5] Subdivision (1) exempts only services of those "in the employ" of churches and church organizations. Subdivision (2) exempts services performed by ministers and members of religious orders who are not, strictly speaking, considered employees. The language in subdivision (2) is similar to that used in other employment tax provisions of the Code under which ministers and members of religious

deal with churches or religion either expressly or by necessary implication.

The "church" exemption in subdivision (b)(1) has two subparts which together embrace the entire subject of church organizations. Subpart (A) covers all services rendered in the employ of "a church or convention or association of churches." This language was not custom-made for FUTA. Rather, it carried into FUTA identical language which is found in other parts of the Code for different purposes. A germane analysis is contained in Whelan, *"Church" in Internal Revenue Code,* 45 Fordham L. Rev. 885, 887-891 (1977). The broad sweep of the language of subpart (A) is evident from the history and meaning of its antecedents.[6] Subpart (B) introduced a new formulation which includes organizations which would ordinarily be considered included in the broad subpart (A) language for purposes of some other Code provisions. The reason seems obvious. By

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orders have not been treated as employees. Ministers and members of religious orders are not subject as employees to withholding [§3401(a)(9)] and mandatory social security coverage [§§1402(e), 3121(b)(8)(A)].

[6] The language of subpart (A) appeared in the 1950 Code provisions exempting churches from the unrelated business tax imposed by section 421(b)(1)(A) on other organizations described in section 501(c)(3) of the Code. Section 421(b)(1)(A) was recodified at section 511(a)(2)(A) of the Code in 1954. During the recodification the Senate Finance Committee stated the following concerning the meaning of "church" in section 170 dealing with deduction of charitable contributions:

> "Your committee understands that 'church' to some denominations includes religious orders as well as other organizations which as integral parts of the church are engaged in carrying out the functions of the church whether as separate corporations or otherwise. It is believed that the term church should be all inclusive." S. Rep. No. 1622, 83rd Congress, 2d Sess. 30 (1954).

reason of a variety of corporate and other arrangements by which churches implement their missions, persons in the employ of certain church organizations might not in some cases be deemed "employees" of the "church or convention or association of churches."[7]

As already noted, the precise meaning of this statutory language, as applied to particular cases, is not the burden of this discussion. Rather, this *amicus* seeks only to demonstrate that when Congress dealt with exemptions for churches and church organizations, it did so entirely in section 3309(b)(1). This is clear from the structure of the statute and the relevant statutory language. There is no indication that Congress meant to omit from section 3309(b)(1) the entire subject of church schools, clearly a vital and integral part of the mission of churches,[8] in order to deal with it two subdivisions later. It has been quite correctly held concerning section 3309(b)(1)(A):

> "The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing."

States of Alabama and Nevada v. *Marshall*, 626 F.2d 366, 396 (5th Cir. 1980).

The foregoing demonstrates that the language of subdivision (b)(3) was not meant to operate in an unqualified way to *all* elementary and secondary schools. Church schools were not governed by subdivision (b)(3).

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[7] This is supported by the reference to separate incorporation in the legislative history. H.R.Rep. No. 612, 91st Cong., 1st Sess. 44 (1969).

[8] cf. *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602, 616-619 (1971).

Indeed, neither were public elementary and secondary schools. In 1970 section 3306(c)(7) exempted all services rendered to the States and their political subdivisions and instrumentalities, although state coverage was extended to certain hospitals and institutions of higher education under section 3309(a)(1)(B).

The design and method of the statute is clear. In 1970 the general exemption theretofore granted to all section 501(c)(3) organizations by section 3306(c)(8) was withdrawn for state coverage purposes by section 3309(a)(1)(A), except for the special "church" exemption granted by section 3309(b)(1). Likewise, in 1970 the general exemption theretofore granted to states by section 3306(c)(7) was withdrawn on a limited basis for state coverage purposes by section 3309(a)(1)(B). In short, the statute dealt with church and public schools independently of section 3309(b)(3). Note should be made of the fact that in 1976 Congress extended state coverage to public elementary and secondary schools by amending section 3309(a)(1)(B) to include all section 3306(c)(7) services except for certain limited exceptions provided by a new section 3309(b)(3). Clearly, until 1976 the source of the exemption for public schools had been section 3306(c)(7) and not section 3309(b)(3).

It seems clear that before 1976 subdivision (b)(3) was intended to apply only to elementary and secondary schools operated by remaining section 501(c)(3) organizations which were not included in the subdivision (b)(1) exemption granted to churches and church organizations.

The 1976 amendments did not revoke the FUTA exemption of elementary and secondary church schools

It is obvious that the repeal of subdivision (b)(3) in 1976 could not revoke an exemption which churches were granted under subdivision (b)(1). The sparse remarks[9] contained in the House, Senate and Conference Reports can hardly operate to enlarge, by implication, the scope of subdivision (b)(3) beyond that intended at the time of its enactment.[10] As noted earlier, legislative intent is determined at the time of enactment.

If there were any lingering doubt of the foregoing by reason of remarks found in the legislative history, it would be foreclosed by the cardinal rule against repeals

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[9] H.R. Rep. No. 755 94th Cong., 1st Sess. 2, 6, 41, 56 (1975) S. Rep. No. 1265, 94th Cong., 2nd Sess. 2, 8-10 (1975), H.R. Conf. Rep. No. 1745, 94th Cong., 2d Sess. 11-12 (1976). These remarks do not in terms address the subject of church schools. They are consistent with the intended operation of subdivision (b)(3) in the sphere already indicated. To infer more is unwarranted. In this regard, note should be taken that the House Committee Report stated that the amendment ". . . had the effect of requiring the State to pay unemployment compensation on the basis of services performed for all educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education." One example of services exempt under section 3309(b)(1) which appears in the 1970 legislative history is "a college devoted primarily to preparing students for the ministry." H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969). Such a college is an "institution of higher education" as defined in FUTA section 3309(d). Plainly, the 1976 House Report was not dealing with church schools. If it was, it was guilty of basic error in its statements.

[10] *International Brotherhood of Teamsters* v. *United States*, n.1, *supra*, at 354 n. 39; *United States* v. *Price*, 361 U.S. 305, 312-13 (1960); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282 (1947).

by implication. Absent express and unequivocal words of repeal, an earlier statute is deemed repealed by a later one only if there is irreconcilable conflict and repugnance between provisions of each.[11] Regarding amending legislation, this Court has said:

> ". . . The intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.[12]

If doubt persists concerning the foregoing two propositions, it should be resolved in favor of petitioners without constitutional excursions

An approach to statutory construction which requires a preliminary exploration of possible constitutional infirmities should be limited to cases of absolute necessity.[13] As this Court knows, its utterances concerning even the potentiality of constitutional mischief carry great weight despite their technical status as dicta and the fact that the Court does not reach the merits of the potential constitutional issue. By experience this *amicus*

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[11] *Tennessee Valley Authority* v. *Hill*, _____ U.S. _____, _____, 98 S.Ct. 2279, 2299 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); *Posadas* v. *National City Bank of New York*, 296 U.S. 497, 503 (1936).

[12] *Posadas* v. *National City Bank of New York*, n. 11, *supra*, at 503.

[13] See *NLRB* v. *Catholic Bishop*, 440 U.S. 480 (1979).

knows what effect they can have on federal employees (and others) who are charged with interpreting, implementing or influencing legislation. There are other salutary guides to construction which serve this Court well.

At the threshold there is the fact that FUTA is tax legislation. Its social objectives do not make it an exception; most tax legislation has the ultimate purpose of funding desired social ends. Beyond that, FUTA does more than tax. It also regulates. Surely it is appropriate to employ the rule of construction that resolves doubts under tax legislation against the government.[14]

More fundamental, however, is the rule which counsels a strict construction where a statute is said to take away a well-established right or privilege.[15] This Court has declared that courts must interpret statutes in a way which accords with established public policy unless the legislature "has given an affirmative indication of an intent" to the contrary.[16] This applies to "common law principles — many of them deriving from earlier legislative exertions."[17] The extraordinary strength and vitality of public policy rooted in our general law lies at the heart of the rule which counsels caution when statutes are said to undermine that policy.[18] Where a statute is both remedial and in deroga-

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[14] *Gould* v. *Gould*, 245 U.S. 151, 153 (1917). See also 3 C. Sands, Sutherland Statutory Construction, §6601 at 179 (4th ed. 1972).

[15] *Texas* v. *Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436-437 (1906); *Globe* v. *Rutgers Fire Ins. Co.* v. *Draper*, 66 F.2d 985 (9th Cir. 1933)

[16] *Moragne* v. *States Marine Lines, Inc.* 398 U.S. 375, 393 (1970)

[17] Id. at 382; see 390-391.

[18] 2 A C. Sands, *supra*, §56.03 at 407.

tion of the common law, a rule of strict construction governs the extent of the derogation and a liberal rule guides its application.[19]

This court has stressed that the policy of exempting churches from various taxes in this country reflects a ". . . national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation. . . ." *Walz* v. *Tax Commissioner of City of New York*, 397 U.S. 664, 678, 676-678 (1970). "Few concepts are more deeply embedded in the fabric of our national life . . ." (at 676). "Such a policy is not something lightly to be cast aside" (at 677). So much more is this true where, as here, regulation inheres in the taxing measure.

The adoption of a rule of strict construction is especially appropriate today when the churches and ministers of this nation are increasingly the objects of taxation, and surveillance for tax and other purposes.[20] The phenomenon is alarming.[21] It should be a cardinal principle that governmental incursions in such areas must be unequivocally stated in statutes and regulations. Such a rule would promote clarity and reduce controversy save for the constitutional issues that may exist. To the extent such issues do exist, they should be presented as a matter of necessity when a statute or regulation clearly requires.

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[19] 4 C. Sands, *supra*, §60.01 at 29 nn. 2 & 4 (4th Supp. 1980).

[20] See *e.g.*, Whelan, *supra*. See also Note, *IRS Monitoring*, 45 Fordham L. Rev. 929 (1977).

[21] Next February representatives of approximately 40 denominations will gather in Washington, D.C. to participate in a conference on "Government Intervention In Religious Affairs."

CONCLUSION

For the reasons stated above, this *amicus* urges the Court to reverse the decision of the Supreme Court of South Dakota.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief of United States Catholic Conference in Support of Petitioners have been served this 18th day of December, 1980 by mail on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, Counsel for Petitioners, and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, Counsel for Respondent.

GERALD C. TOBIN